

IN THE SUPREME COURT OF BELIZE, A.D. 2010

CLAIM NO. 433 of 2010

THE BELIZE BANK LIMITED Claimants/Respondents
BCB HOLDINGS LIMITED

AND

THE CENTRAL BANK OF BELIZE Defendant/Applicant

Hearings

2010
7th July
16th July
22nd July

Mr. Eamon Courtenay SC and Mrs. Ashanti Arthurs-Martin for the
Claimant/Respondents

Ms. Lois Young SC and Ms. Deanne Barrow for the Defendant/Applicant

LEGALL J.

JUDGMENT

1. The claimants filed a claim against the defendant dated 15th June, 2010. Among the reliefs claimed was an application for an injunction to prevent the defendant from enforcing a directive it issued to the claimants, under section 36(5) of the Banks and Financial Institutions

Act Chapter (the Act). The claimants and the defendant filed affidavits in relation to the application for the injunction. The claimants also filed skeleton arguments dated 18th June, 2010. The defendants also filed skeleton arguments dated 6th July, 2010. The application for the injunction was set for hearing on 7th July, 2010.

2. On the said 7th July, 2010 at 8:30 a.m. a new application was filed by the defendant in the General Registry of the Supreme Court asking for certain orders as follows:

- “1. That this Application be heard on short notice.
2. That the issue of whether the Claimants should be required to pursue the appeal process, for adjudicating on their grievances against the directive of the Central Bank and for interim relief, to the banks and Financial Institutions Appeal Board, be tried in priority to all other issues.
3. That in the event the Court orders that the Claimants are required to pursue the appeal process, that the Claim of the Claimants be struck out.
4. That in any event the claim of the second Claimant be struck out as disclosing no reasonable grounds for bringing the claim.
5. Further or other relief.
6. Costs to be borne by the Claimants.”.

3. Learned senior counsel for the claimants objected to the hearing of the new application, one of the grounds being that he did not have

sufficient time to respond to the application. This objection could not be faulted, and the hearing of the new application was set, with the agreement of both sides, for 16th July, 2010 for hearing at 10:30 a.m. In the meantime, both sides gave undertakings to the court. The undertakings given by the claimants through their counsel is as follows:

“The Belize Bank undertakes not to publish its audited accounts for the financial year 2009-2010 until 16th July, 2010 the date set by this court for the hearing of the application by the Central Bank of Belize dated 6th July, 2006.”

4. The undertaking given by the defendant through its counsel is as follows:

“The Central Bank of Belize undertakes to vary the directive issued on 14th June, 2006 to the extent only that the Belize Bank Ltd. is not required to comply with the directive until 16th July, 2010 the date set by the court for the hearing of the application by the Central Bank dated 6th July, 2010.”.

5. Counsel for the defendant indicated a possible revisit to the undertakings at the end of the hearing on 16th July, 2010. At the hearing of the new application, it was submitted by the defendant/applicant that, prior to bringing of the claim in this matter, the claimants should have first complied with the appeal procedures

provided in the sections 70 and 71 of the Act. These sections, which are given in more details below, provide for the appointment of an Appeal Board to hear and determine appeals against decisions of the defendant/applicant. Several authorities were cited by the applicant in support of the application.

6. In *R v. IRC Exp. Preston 1986 1 AC 835* a claim in judicial review proceedings for a declaration to prevent Inland Revenue Commission from the exercise and performance of statutory powers and duties under the Income and Corporation Taxes Act 1970. The House of Lords held that the Commissioners were amenable to judicial review and a taxpayer could challenge a decision of the Commissioners if he could show that they exceeded their jurisdiction, abused their statutory power or acted ultra vires.
7. But it was said that in the case judicial review should not be granted where an alternative remedy was available. Lord Templeton and Lord Scarman agreed that judicial review should not be granted, where an alternative remedy was available, and only rarely will the courts allow the collateral process of judicial review to be used to attack an appealable decision.” The court held that the “judicial review process should not be admitted to supplant the normal statutory appeal procedure”: see *Exp. Preston* per Lords Scarman and *Templeton* at pages 852 and 862. But Lord Scarman also said that “cases for judicial review can arise even where appeal procedures are provided by Parliament.”

8. In *Reg. v. Inland Revenue Commissioners 1982 A.C. 617* Lord Wilberforce said that “such a collateral attack – as contrasted with the direct appeal on law to the courts – would no doubt be rare, but the possibility certainly exists.”

9. In *Smeeton v. Attorney General 1920 1 Chd 85* the plaintiff brought an action for a declaration that he did not carry on a business from which excess profits duty is payable under the Finance Act 1915(U.K.) and denied he had a duty to file a return to the Commissioner of Inland Revenue. There was an appeal procedure under the Act to the general commissioner; but the plaintiff brought his action straight to the court instead of following the appeal procedures. It was submitted that the question in the action ought to be determined by the Commissioners “with an ultimate appeal to the court which deals with revenue case.” The court held that the plaintiff should have exhausted the appeal procedure, and if the Commissioners decided against him, he could then have the question determined by the court, because the “legislature in passing this Act can hardly have contemplated that questions of this kind were to be removed from the consideration of the Commissioners.”

10. In *Belize Telemedia Ltd. v. A.G. No. 464 of 2008 (Belize Supreme Court unreported)* the claimant challenged a decision of the Commissioner of Income Tax under the Income and Business Tax Act Chapter 55 of the Laws of Belize. Before the substance of the claim could be heard, an application was made to strike out the claims because an “alternative remedy exists by virtue of section 42 and 43

of the Act” and that the claim was an abuse of the process of the court in that the allegations of the claimants were the subject of three appeals to the Supreme Court from a decision of a Magistrate.

11. Conteh CJ dismissed the claim on the ground that “the taxpayer cannot short circuit or by pass the remedial appellate processes and forums stipulated in the Act and come directly to this court to launch a collateral attack on the Commissioner of Income Tax’s assessment of its tax liability and enforcement of same.” The Chief Justice, later in his judgment, pointed out that he “found nothing exceptional or rare in the taxpayers assessment to warrant the claim for declaration going forward outside of the establishing appeal procedure under the Act.” In *R v. Eping ex parte Goldstraw 1983 3 AER 351* it was held that “save in exceptional circumstances the jurisdictions of the Supreme Court would not be exercised where other remedies were available and had not been used.”

12. The case before me is not in relation to assessment of tax under any Tax Act, but in relation to appeal provisions with respect to decisions of the defendant/applicant made under the Act. But the general principle of the above mentioned cases was upheld in relation to an application for judicial review by the Court of Appeal of Belize in *Bevans v. Public Services Commission B.L.R. p. 155*. The facts and the decision of the court are as follows:

“The appellant applied for judicial review of a decision of the Public Services

Commission that it had jurisdiction to embark on disciplinary proceedings in relation to the appellant. At the hearing of the judicial review application, the Solicitor General on behalf of the Commission took the preliminary objection that the applicant be required to pursue the normal remedy of appeal to the Belize Advisory Council available under section 111 of the Belize Constitution. The learned trial judge upheld the preliminary objection and dismissed the application. On appeal.

HELD – Allowing the appeal.

- (1) Where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure it was only exceptionally that judicial review would be granted.
- (2) In determining whether an exception should be made and judicial review granted it is necessary to examine the suitability of the statutory appeal in the context of the particular case and see whether the appeal procedure is suitable for determining the real issues involved.
- (3) The issue involved was the question of the jurisdiction of the Public Services Commission and since a challenge to jurisdiction is unusual the circumstances were exceptional and therefore fit for judicial review.”.

13. The claim in this matter is asking for the following reliefs:

- (1) A declaration that the defendant has no

jurisdiction to issue the directive contained in a letter dated the 4th June 2010 addressed to the first claimant, namely: “BBL derecognize the asset by passing a prior period adjustment for the \$20.0 million, in addition to any accrued interest capitalized and restate the financial statements for period in which the asset was first recognized” (the Directive)

- (2) A declaration that the decision to issue a directive made to the first claimant by the defendant in a letter from the defendant to the first claimant dated 4 June 2010 that:

“BBL derecognize the asset by passing a prior period adjustment for the \$20.0 million, in addition to any accrued interest capitalized and restate the financial statements for period in which the asset was first recognized” (the Directive)

(i) is ultra vires the powers conferred on the Central Bank by the provisions of Section 36(5) of the Banks and Financial institutions Act, Cap 263 and generally; and or

(ii) is disproportionate, and/or

(iii) was made on the basis of an erroneous view of the law; and/or

(iv) was made on the basis of an unreasonable exercise of discretion and is therefore void and of no effect.

- (3) A declaration that Section 36(5) of the Banks and Financial Institutions Act, Cap 263 contravenes Section 6 of the Constitution of Belize and is therefore unlawful and void.

- (4) A declaration that the Directive contravenes the Constitution of Belize and is therefore void and of no effect.
- (5) A final injunction restraining the defendant whether by itself, its servants or agents or however from in any way acting in consequence of or acting to enforce the directive to the first claimant in its letter to the first claimant dated 4 June 2010.
- (6) Further or other relief.
- (7) Costs.

14. The Appeal Board has the power on appeal to set aside, affirm or make any other decision the bank could have made. The Chairman of the Appeal Board could also grant a stay of any further action by the defendant/applicant.

15. Section 70(1) of the Act states that the Appeal Board may hear and determine all appeals in respect of matters referred to it under the Act. Section 71 refers to matters which the Board can hear and determine including matters “which in the opinion of a licensee might be contrary to any provision of the Act” or any matter made under section 36 of the Act. Section 75(1) states that the “Appeal Board may affirm or set aside the decision appealed against or may make any other decision which the Central Bank could have made.” Section 77(1) states that every party aggrieved by a decision of the Appeal Board may appeal to the Court of Appeal. Under section 76, an appeal does not automatically stay or suspend the decision appealed against, but on an inter partes application to the chairman of the

Appeal Board, if he is of the opinion that exceptional circumstances exist, he is authorized to grant a stay of any further action of the defendant/applicant.

16. The authorities above clearly show, including *Bevans v. Public Service Commission*, a decision which is binding on me, that where there is an alternative remedy and where Parliament has provided a statutory appeal procedure, it is only rarely and exceptionally that judicial review would be granted. The claimants would be entitled to come straight to the court, instead of following the appeal procedures, if there were “exceptional circumstances” to justify judicial review rather than following the appeal procedures under the Act. Only very rarely that courts will allow the collateral process of judicial review to be used to attack an appealable decision: see *Preston* above at p. 852.
17. Although the phrase “exceptional circumstances” may appear to defy definition, in *Bevans v. Public Services Commission* above, the Court of appeal gave us some guidelines:

“In determining whether an exception should be made and judicial review granted it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and to ask itself what in the context of the statutory provisions, was the real issue to be determined and whether the statutory procedure is suitable to determine it.”:

see *Bevans* above at page 158 and 159.

18. The claim in this matter is for an administrative order under Rule 56.7 of the Supreme Court (Civil) Procedure Rules 2005 asking for certain declarations and injunction mentioned above. In this claim by the claimants, what are the real issues to be determined; and is the statutory appeal procedures suitable to determine them. The real issues to be determined are whether the Central Bank exceeded its jurisdiction and acted ultra vires section 36(5) of the Act when it issued the directive; whether the directive itself contravenes section 6 of the Constitution; and further whether section 36(5) of the Act violates section 6 of the Constitution and therefore unconstitutional. These are serious questions of public law. Though the Appeal Board is constituted of a judge of the Supreme Court and two other members who have knowledge of banking, finance and other related disciplines, I do not think that the statutory appeal procedure, the Appeal Board, as constituted under the Act is suitable to determine these public law issues.

19. Would the other two members of the Appeal Board, people trained in economics and accounting, be able to grapple with these public law issues and assist in determining them? I do not think so, and I have serious doubts whether the Appeal Board is suitable to determine the claims made by the claimants.

20. It is also very clear to me, that the claimants are alleging in the claim that the defendant/applicant exceeded its jurisdiction and the directive is ultra vires section 36 (5) of the Act and section 6 of the Constitution. These issues between the parties raise questions of the jurisdiction of the defendant/applicant. In *Bevans* above, which is binding on me, their Lordships say that “a challenge to jurisdiction is unusual.” It was because of the finding that since such a challenge is unusual, the circumstances were exceptional, and so outside the general principle that the statutory appeal procedure should be followed prior to approaching the court That is why the Court of Appeal in *Bevans* held that the matter was fit for judicial review. In this case before me there is a challenge to the jurisdiction of CBB.
21. The applicants ask that the claim of the second claimant be struck out as disclosing no reasonable grounds for bringing the said claim. The second claimant states that it is the parent company of the first claimant, its subsidiary; and that the accounting treatment of the subsidiary, will affect the accounts of the parent company. The second claimant also states that the directive might also adversely affect its application for banking licence in Trinidad & Tobago, its reputation could suffer damage for reasons specified by Mr. Johnson in paragraphs 31 and 32 of his affidavit, and that its share price could be adversely affected. Since these assertions have not, at this stage, been shown to be groundless, it seems to me that the second claimant has an interest in the claim and therefore has standing to bring these proceedings.

24. For the above reasons I make the following orders:

- (1) The application dated 6th July, 2010 in this matter is dismissed.
- (2) Defendant shall pay to the claimants costs, to be agreed or taxed.

Oswell Legall
JUDGE OF THE SUPREME COURT
22nd July, 2010